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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 262

CRISTOBAL GONZALES PADILLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A3) is reported at 267 F 2d 351.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1959 (Vol. IX, 6).[1] A petition for rehearing was denied on June 4, 1959 (Vol. IX, 7). Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari through August 3, 1959 (Pet. App. A6), and the petition was filed on July 30, 1959.

[1] The record consists of nine volumes. Volumes III through VIII, which are consecutively paginated, constitute the transcript of proceedings in the district court and will be referred to as "Tr.".

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner could and did waive trial by jury on a narcotic offense in view of the fact that the statute authorizes conviction on the basis of proof of possession alone, unless the possession is explained to the satisfaction of the jury.

2. Whether the evidence was sufficient to support the conviction.

3. Whether the court of appeals erred in holding that the district court was without jurisdiction to order the return of money taken from the petitioner at the time of arrest, where the money was not an exhibit in the case.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years * * *.

> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

Count four of a five-count indictment returned in the District Court for the Southern District of California charged petitioner and Isaac Gomez with the unlawful concealment and transportation of narcotics in violation of 21 U.S.C. 174. Count five charged that the petitioner, Isaac Gomez, and Antonio Espinoza Ramos conspired to illegally import, sell, transport, and conceal narcotics in violation of 21 U.S.C. 174 (Vol. I, 5–7). Petitioner and the other two defendants, all Mexican nationals, waived trial by jury (Vol. II, 14; Tr. 3–4). Petitioner and Gomez were found guilty on count four, and petitioner, Gomez, and Ramos on count five (Tr. 1001–1002).[2] Petitioner was sentenced to five years' imprisonment on count four and ten years' on count five, the sentences to run consecutively (Tr. 1006). On appeal, the judgment was affirmed (Vol. IX, 6). Petitioner alone seeks review by this Court.

The following are the pertinent facts:

On February 19, 1957, defendant Ramos, from whom Treasury agent Cantu had previously purchased narcotics (Tr. 18–19, 50–51, 173, 474), telephoned

[2] The first three counts charged Ramos alone with violations of the narcotic laws. Ramos was acquitted on count one and convicted on counts two and three (Tr. 452, 999, 1001).

Cantu that he and defendant Gomez would cross the border from Mexico on the next day with thirty-five ounces of heroin for sale and delivery (Tr. 78–79). On February 20th, Ramos drove from Mexico to Anaheim, California, where he met Cantu and Hronek, a county investigator, in a coffee shop and told them that he had thirty-five ounces of heroin for delivery[3] (Tr. 80–81; see Tr. 283). He also told Cantu that Gomez and another person had left Mexico in another car that same morning with "narcotics to be delivered to some person in San Fernando," and "that as soon as Gomez would finish with that, he would join us in Anaheim" (Tr. 81; see Tr. 283). Ramos further stated that Gomez "didn't want anyone else to see the other man" (Tr. 306). On February 20th, Gomez and petitioner admittedly drove from Mexico to California in petitioner's car (Tr. 658–659).

Subsequently, Gomez met Cantu in Anaheim, stated that he was ready to make the delivery, and directed Cantu to follow Ramos' car (Tr. 82–84, 845–847). Ramos, accompanied by Hronek, drove to a motel outside of Anaheim. There, Ramos told Cantu that Gomez wanted the money for ten ounces of heroin before Gomez would allow delivery of the remaining twenty-five ounces (Tr. 88). After this offer was rejected, Ramos and Hronek drove back to Anaheim where Ramos conversed with petitioner and Gomez on the street (Tr. 277–278). During this conversation, petitioner, who had been seen with Gomez on several earlier occasions that day (Tr. 251–252, 271,

[3] Ramos of course did not know that Cantu and Hronek were government agents.

300–302), was observed shaking his head from side to side (Tr. 280). Ramos then returned to tell Hronek, who was still in the car, that Gomez "doesn't want to give me the 25 ounces. The other man, he has got a deal, and he is the reason why [Gomez] doesn't want to deal" (Tr. 280–281). Ramos rejoined petitioner and Gomez for another conversation (Tr. 281). After again coming back to the car, Ramos told Hronek that Gomez wanted the money from the sale of the ten ounces first, and that petitioner did not want to go through with the deal (Tr. 282). He said that the remaining twenty-five ounces were in his (Ramos') jacket but that the jacket was in the possession of Gomez and petitioner (Tr. 282–283).

On returning to the motel, Ramos was arrested. During the subsequent search, a package, which on later analysis was found to consist of approximately 9½ ounces of heroin hydrochloride, was discovered between two mattresses and seized (Tr. 93–94, 337). Later that evening, Gomez and petitioner were stopped by police while driving near the Mexican border (Tr. 357–358, 372–373). Petitioner gave a fictitious name (Tr. 703). Ramos' jacket containing three packages was observed on the back seat of the automobile which belonged to petitioner (Tr. 396, 398–399, 402). On analysis, the packages were found to contain approximately twenty-five ounces of heroin hydrochloride (Tr. 347). The sum of $2156 (which petitioner claimed was his) and the registration card of the motel, where Ramos was to deliver the ten ounces of heroin and where Ramos was arrested, were found in the glove compartment of the car (Tr. 400–

401, 912–914). On searching the two men, the arresting officers found $130.52 on petitioner and $271.09 on Gomez (Tr. 374, 413).[4]

ARGUMENT

1. (*a*) Petitioner points to that portion of 21 U.S.C. 174, which places on the defendant the burden of explaining the possession of narcotics to the satisfaction of the jury, and argues that this provision imposes a jurisdictional limitation on the district court barring it from accepting a waiver of trial by jury (Pet. 13–15). This contention affects only the sentence on count four, since count five alleges a conspiracy to violate 21 U.S.C. 174, not a substantive violation of that section. Under the explicit terms of 21 U.S.C. 174, the presumption resulting from unexplained possession of narcotics applies only in a "trial for a violation of this section."

In any event, the government's case justifying a conviction (in contrast to the defendant's burden to explain possession) does not, under the statute, depend on any specific finding that *must* be made by a jury other than the normal finding of guilt beyond a reasonable doubt.[5] Since all narcotic cases, like

[4] At the close of all the evidence, the court granted the government's motion to admit the acts and declarations of each defendant, which had previously been limited to the particular named actor or declarant, against the other co-defendants (Tr. 1001).

[5] This situation contrasts with that under the kidnapping statute, 18 U.S.C. 1201, where the death sentence cannot be imposed unless the jury affirmatively so recommends. Thus, there can be no sentence of death unless there is a jury trial.

other criminal cases, are triable by jury absent a specific waiver, Congress said, in the proviso allowing the defendant to explain possession, that the explanation must be to the satisfaction of the jury. In other words, Congress was using the term jury in the sense of the normal finder of fact. If a defendant chooses to have the judge act as jury, by waiving jury trial, the explanation must be to the judge as the substitute for the jury.

Neither the legislative history of the origin of 21 U.S.C. 174 (Act of Feb. 9, 1909, ch. 100, § 2(c), 35 Stat. 614), nor its reenactment in amended form in 1956 (Act of July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570), contains any intimation that Congress intended to withhold the usual right of defendants in criminal cases to choose to be tried by a judge rather than a jury. Similarly, there is no indication that Congress intended to limit the jurisdiction of the district courts in narcotic cases more narrowly than in other criminal cases. See H. Rep. 2003, 60th Cong., 2d Sess. (1909); 43 Cong. Rec. 1681–1684, 1716 (1909); H. Rep. 2388, 84th Cong., 2d Sess. (1956); H. Rep. 2546 (Conf. Rep.), 84th Cong., 2d Sess. (1956). Indeed, limitation of the jurisdiction of the district courts might interfere with the object of the statute in seeking to stamp out illicit traffic in narcotics. H. Rep. 2003, *supra*, pp. 1–2; H. Rep. 2388, *supra*, pp. 1, 7–13. It is thus evident Congress was not, in this statute, imposing a limitation which would bar the defendant from his usual right to waive trial by jury if he voluntarily and with understanding chose to do so. See, *e.g.*, *United States* v. *Chiarelli*, 192 F. 2d 528, 530 (C.A. 7), certiorari denied, 342 U.S. 913.

(*b*) Petitioner also contends (Pet. 15–17) that he did not intelligently and competently waive his right to a jury trial because he could not speak English and the right to a jury trial was not explained to him. Even aside from the fact that the record shows that petitioner could speak English (Tr. 655), this contention is without merit. Petitioner and his attorney signed a written waiver of a jury trial (Vol. I, 14). When the judge asked petitioner and his co-defendants in open court if they understood that their attorneys had waived a jury trial and that the case would be tried without a jury, they answered in the affirmative through an interpreter (Tr. 3–4). It is thus clear that petitioner knew of his right to trial by jury.

2. Petitioner's contention (Pet. 17–25) that the evidence was insufficient to support his convictions on counts four and five is also without merit. As petitioner did not satisfactorily explain the possession of twenty-five ounces of heroin hydrochloride taken from his car, this evidence of possession alone sufficiently supported his conviction on count four under 21 U.S.C. 174. *Casey* v. *United States*, 276 U.S. 413, 418; *Yee Hem* v. *United States*, 268 U.S. 178, 183–184; *Stoppelli* v. *United States*, 183 F. 2d 391, 394 (C.A. 9), certiorari denied, 340 U.S. 864; *Pitta* v. *United States*, 164 F. 2d 601, 602 (C.A. 9); *Aeby* v. *United States*, 206 F. 2d 296, 298, 299 (C.A. 5), certiorari denied, 346 U.S. 885; *United States* v. *Chiarelli*, *supra*, 192 F. 2d at 531; *Landsborough* v. *United States*, 168 F. 2d 486, 488 (C.A. 6), certiorari denied, 335 U.S. 826. Moreover, the evi-

dence demonstrated that the petitioner was an aider and abettor to the projected illicit sale and delivery of narcotics by Ramos and Gomez, and hence, under 18 U.S.C. 2, a principal to such an illegal sale. See *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811; *United States* v. *Chiarelli*, *supra*, 192 F. 2d at 531; *United States* v. *Hodorowicz*, 105 F. 2d 218, 220 (C.A. 7), certiorari denied, 308 U.S. 584.

As to count five, it is well settled that actual "[p]articipation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser* v. *United States*, 315 U.S. 60, 80. In other words, circumstantial evidence of concerted action and design is clearly sufficient. See *Delli Paoli* v. *United States*, 352 U.S. 232, 236; *Poliafico* v. *United States*, 237 F. 2d 97, 104 (C.A. 6), certiorari denied, 352 U.S. 1025; *O'Neal* v. *United States*, 240 F. 2d 700, 702 (C.A. 10); *United States* v. *Morris*, 225 F. 2d 91, 93 (C.A. 7), certiorari denied, 350 U.S. 901; *Phelps* v. *United States*, 160 F. 2d 858, 867–868 (C.A. 8), certiorari denied *sub nom. Peters* v. *United States*, 334 U.S. 860; *United States* v. *Manton*, 107 F. 2d 834, 839 (C.A. 2), certiorari denied, 309 U.S. 664. In the light of these established principles, the facts set forth in the Statement, *supra*, pp. 3–6, amply support the conclusion that petitioner was actively co-operating with his co-defendants in their illegal enterprise and was therefore guilty of conspiracy. Cf. *United States* v. *Iacullo*, 226 F. 2d 788, 794–795 (C.A. 7), certiorari denied, 350 U.S. 966; *Poliafico* v. *United States*, *supra*, 237 F. 2d at 104–106.

3. Petitioner claims (Pet. 25–28) that the court of appeals erred in holding that the district court was without jurisdiction to order the return of the money taken from petitioner at the time of his arrest. The right to this money, however, is a matter to be adjudicated in a civil suit and not an issue to be decided in the criminal trial. Although the fact that the money was taken was adduced at the trial, it was not offered in evidence and was not in the custody of the United States Attorney or the agents who testified at the trial.* Therefore, as the court of appeals held (Pet. App. A3), the money never came within the control of the district court in this proceeding. Moreover, at no time did petitioner ask the district court for the return of the money.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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* The money was in the custody of the United States Collector of Customs at San Diego (Pet. App. A3).

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